SUPREME COURT OF THE UNITED STATES

No. 301 [illegible] 47 1

SAMUEL W. LAMBERT

Appellant

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and EMORY R. BUCKNER, as United States Attorney

PETITION FOR REHEARING

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Rehearing herein is asked because

(a) The Court has been under a misapprehension as to the state of the record; and

(b) By reason of such misapprehension, has applied a new rule as to the constitutionality of legislation which surrenders judicial control or review of its necessity or appropriateness.

Your petitioner urgently submits that this new rule—that legislation attacked as unreasonable in that it was passed without investigation or finding, must be supported as embodying an *implicit finding* against the point of attack—has been confused with an entirely alien and

inapplicable presumption of good faith. This rule, new so far as your petitioner has been able to ascertain, has, it seems to your petitioner, been annunciated by this Court without realization of the extreme denials of actuality it involves.

Misapprehension of record as to the absence of any Congressional inquiry on necessary dosage in stated periods of time.

Your petitioner, in his complaint, has attacked as unconstitutional one, and only one, provision of the legislation, namely, that clause which prohibits the prescription of more than one pint of spirituous liquor in ten days. It is unnecessary to state that the reasonableness or unreasonableness of other features are not involved in this litigation. Whether or not upon other features of the legislation hearings were had or testimony taken is here entirely beside the point.

There has been in this case, in the District Court, a judicial investigation into this state of the Congressional records and a judicial finding that the prohibition of a pint in ten days was preceded by no inquiry or finding. After the case had been *sub judice* before Judge KNOX for nearly three months he summoned to his chambers counsel for the Government and for the complainant and asked of them whether there had been any prior Congressional finding as to the adequacy of the dosage of one pint in any ten days as provided in the Volstead Act. Counsel for the Government insisted that there had been such a finding, while counsel for the complainant stated that their previous careful investigation had resulted in discovering no such finding.

Thereupon counsel for the Government were given an

extended time within which to produce any such finding, and counsel for the complainant undertook, as officers of the Court, to conduct a further exhaustive investigation on the subject.

At the expiration of such time counsel again appeared before Judge KNOX at his request, and each counsel announced that in the interim no such Congressional finding or even consideration had been discovered.

It had not been discovered for the reason that no such finding existed. The following judicial finding by Judge KNOX was therefore not casual, but the result of an inquiry of the formal character indicated.

Judge KNOX held (Record, p. 15):

> "So far as I am informed, the legislation complained of does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease. If otherwise, I should be inclined to dismiss the bill, it being my impression that within reasonable limits the quantity to be prescribed may be regulated by Congress. But, accepting the complaint as made, the limitation now imposed seems to be arbitrary and without justification. Should the proof show the contrary to be the fact, the complainant of course cannot prevail."

Judge KNOX in his opinion (Record, p. 16) immediately thereafter quotes a formal declaration which might well be considered an explicit finding negativing any implicit finding: In the report of the Senate Judiciary Committee dated June 11, 1917, in which the adoption of the concurrent resolution submitting the amendment to the States was recommended, the Committee therein stated:

> "Alcohol would still be manufactured, distributed

and sold under the restrictions appertaining to other poisons; and in use as a medicine, and in the arts would not be interfered with."

The Government's brief in the Circuit Court of Appeals frankly admitted that on the subject of necessary dosage no testimony had been taken, saying at page 34:

> "The testimony before the Senate Judiciary Committee reveals *only* the following statement made by Wayne B. Wheeler, which was as follows:
>
> " 'This section (Sec. 7), provides how alcohol for non-beverage purposes and wine for sacramental purposes may be sold. This section continues substantially the present system of the Federal Government, which applies especially in prohibition territory. Under Treasury Decisions 2788 it is unlawful for a pharmacist to sell alcohol in quanties of more than one pint unless it is medicated so as to be unfit for beverage purposes. Persons who desire to purchase alcohol in quantities of more than one pint must secure a permit and give a bond that they will use such alcohol only for permitted purposes. Sec. 7 permits persons to secure the alcohol or wine under these regulations until they expire, but requires that the system be made uniform by December 21, 1920. It provides also that physicians who are to prescribe alcohol shall secure a permit from the Commissioner or other officer of prescriptions issued, and keep a record. This plan will hold in check physicians who are inclined to issue prescriptions for beverage purposes. It may be a slight burden upon the regular physician who will not violate the law. Every day, however, places some extra burden upon law-abiding citizens in order to reach the person inclined toward lawlessness. South Dakota (Sec. 39) and other States require physicians to take out permits if they prescribe alcoholic compounds.

(Hearing before the Senate Judiciary Committee of the 66th Congress, page 85)."

It will be noted that this statement of Wayne B. Wheeler does not purport to give any consideration to the pint in ten day provision or to a possible relationship between a pint in ten days and the cure of any known ailment.

In the same brief, at page 35, the Government pointed out that the source of the limitation of one pint was a taxing statute. The portion therein quoted limits the quantity to one pint, *but does not contain any limitation in period of time or any reference to ten days.* It is the ten day feature used in combination with the one pint limit which constitutes the medical prohibition. Why or when these two elements were first combined is unknown. No medical opinion has any relationship whatsoever to the subject.

Before this Court the Government's brief took a somewhat different attitude toward the question, and, without setting forth text or detail, made the general assertion of exhaustive hearings by Congress—not, it will be noticed, in regard to the feature of the legislation solely before the Court—and further generally asserted that the facts adduced were ample to support the legislation. The Government's brief in this connection, stated, at page 13:

> "Committees of Congress conducted exhaustive hearings both at the time of the passage of the original Prohibition Act and during the summer and fall of 1921 when the Supplemental Act was before it, and the facts adduced were ample to support the legislation. (Congressional Record, 67th Cong., 1st Sess., Vol. 61, pp. 3091-3135, 3454-3461, 3590-3596, 4032-4039, 8748-8757.)
>
> "At the hearings before the Congressional Com-

> mittees the entire subject of the medicinal use of beverage intoxicants was thoroughly gone into."

It is respectfully submitted that these general statements were on this particular subject unintentionally misleading. Regardless of the exhaustive hearings in their relation to the general subject-matter, and regardless whether the facts adduced were ample, in the opinion of the Government, to support the legislation, the impression should not have been created by the very generality of the language, that the particular feature of a pint in ten days as dosage for all ailments under all circumstances was ever the subject of any hearings or that any facts were adduced to support it.

This state of the record, it is respectfully submitted, and the changed attitude which the Government has taken toward its investigation inaugurated at the request of Judge KNOX, has led this Court to overlook the entire absence of inquiry into the amount of dosage of spirituous liquor, and to regard evidence *subsequently* before Congress in regard to beer not being a medicine as involving (through implication) a hearing and determination that spirituous liquors (conceded by the Government herein to be medicine and in terms treated as such) ceased to be a medicine in amounts beyond a pint in ten days.

The matter is too important for implications which contradict the facts. The Government should be required to produce before this Court the complete text of everything claimed to constitute hearing, testimony, evidence, or consideration of the adequacy, under any medical opinion whatsoever, of one pint in ten days in the treatment of any known ailment or disease.

The supreme importance of the facts as to these Con-

gressional hearings, the conclusions of which were agreed to by the counsel for the Government and for the complainant before Judge Knox is unmistakable. For to the facts elucidated in these hearings recourse must be had to sustain the constitutionality of Section 7. That this is clear beyond question is apparent from this: If Congress without inquiry had enacted Section 7 under the authority of the 18th Amendment which prohibited the manufacture, etc., of liquors for beverage purposes only, counsel for the complainant insists that no one representing the Government would have the hardihood to claim that Section 7 was constitutional. The sole justification for now holding the contrary is the implication of findings precluding judicial inquiry into what otherwise is unreasonable and arbitrary control of medical practice.

Misapprehension of the Court as to the novelty and extremity of its ruling that implicit findings must be considered as made to support the prohibition of more than one pint in ten days.

This Court has herein stated:

> "Not only so, but the limitation as to quantity *must be taken as embodying an implicit Congressional finding* that such liquors have no such medicinal value as gives rise to a need for their more frequent prescriptions."

Your petitioner recognizes the rule as set forth in *Muller* v. *Oregon*, 208 U. S., 412, 421, that this Court will take judicial cognizance of all matters of *general knowledge* in reviewing the reasonableness of legislation and will attribute such knowledge to the Legislature.

But the subject-matter herein is not one of general knowledge. There is no presumption that Congressmen

intuitively know such matters, even when they are assembled in Congress. The discoverer of any relationship between a pint in ten days and health remains anonymous; and any presumption on the subject where the exact facts are capable of ascertainment is, we respectfully submit, unwarranted as is any presumption on a subject not of general knowledge when it proceeds in denial of the facts.

The determination of the case at bar upon implicit findings of Congress on the subject has, it is respectfully submitted, led to a contradiction between the case at bar and the recent case of *Everard's Breweries* v. *Day*, 265 U. S., 545. The legislation prohibiting beer as a medicine proceeded, as determined by this Court, upon inquiry and conclusion that beer in fact was not a medicine. This Court, at page 562, stated that Congress, in the light of testimony, determined that malt liquors possessed no substantial and essential medicinal properties, and that

> "as a matter affecting the public health, it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors in addition to the non-intoxicating malt liquors whose manufacture and sale is permitted under the National Prohibition Act."

This Court further stated, at page 562:

> "The distinction made by Congress between permitting the prescription of spirituous and vinous liquors while prohibiting the prescription of malt liquors is not plainly unreasonable or without a substantial justification, based upon their essential differences."

The Court in the case at bar, in regard to *Everard's Breweries* v. *Day*, has held that if adhered to it disposes

of the present case; that from the standpoint of power both cases are the same; and, so far as expediency is concerned, the matter is solely for the consideration of Congress.

It is respectfully submitted that such a conclusion of identity as a matter of the Congressional power rests—and can solely rest upon the implicit Congressional finding—contrary to the facts—which has been made the basis of the decision herein.

The genesis of the Willis-Campbell legislation was the promulgation of an opinion by the then Attorney-General, Mr. A. Mitchell Palmer, as to medicinal prescriptions of beer. The Congressional investigation began, continued and ended with the subject of beer. And we can do no better, in substantiation of this statement, than to quote from the brief of the Government in this case before the Circuit Court of Appeals:

> "On March 3, 1921, the retiring Attorney-General rendered an opinion which held that as Congress had not mentioned or limited the prescription of beer in Section 7 of the Volstead Act, the Commissioner of Internal Revenue had no right to do so and that permits should issue to brewers to manufacture beer for medicinal purposes and to doctors to prescribe it without limitation. (Opinions A. G. March 3, 1921.) Almost immediately a bill was introduced in Congress which was the origin of the Supplemental Act of November 23, 1921."

And the production before this Court of these hearings will, so far as we are informed, disclose the fact that not one authoritative word was uttered or intimated as to the adequacy of the dosage of one pint in ten days.

It is respectfully submitted that the rule, which heretofore has been that statutes are protected against an attack

of unconstitutionality by virtue of legislative findings, has been predicated upon the actuality of such findings.

Radice v. *New York*, 264 U. S., 292, 294.

The present ruling that such findings may be inferred from the mere existence of the statute, in effect destroys the rule and makes no distinction so far as reasonableness is concerned between acts passed after consideration and acts passed without consideration into the facts. Under such rule the existence of the statute is sufficient and conclusive proof of reasonableness. Under such a rule the courts surrender their control as to the necessity or appropriateness of legislative measures affecting public health. Heretofore it has been clearly within the province and duty of the courts to determine matters of reasonableness in the absence of consideration on that subject by the legislative body.

It is respectfully submitted that the Court herein has not intended this sweeping change in the rule, particularly upon the state of the present record.

Dr. Lambert on one phase of his case urged as controlling the recent ruling of this Court (*Lindner* v. *United States*, 268 U. S., 5, at p. 18), that "obviously, direct control of medical practice in the States is beyond the power of the Federal Government."

This Court in the case at bar has now held that "there is no right to practice medicine which is not subordinate * * * to the power of Congress to make laws necessary and proper for carrying into execution the Eighteenth Amendment."

Your petitioner recognizes that while the overruling, by implication, of *Lindner* v. *United States* may have been intended herein, that particular feature of the case is not advanced as justifying a rehearing.

This Court, in thus overruling this recent decision has, in doubt, and sharp division, arrived at the conclusion, that prohibition of liquor for beverage purposes justifies prohibition of medicine administered in accordance with accepted medical practice. But the *method* of decision, that there *must* be a finding implied from the legislation itself, precluding a judicial determination of its unreasonable and arbitrary character, has been applied, we urgently submit, without a realization of its far-reaching and destructive effect upon the previous rule.

We desire to add the following in conclusion:

Admittedly the Eighteenth Amendment was aimed against the social and economic evils following in the train of unrestricted indulgence in intoxicating liquors—including the corner saloon and the neglected wife and family, etc. The Amendment deals with no other subject than *beverage uses of such liquors*, and yet by judicial construction—through acceptance of the declaration of counsel for the Government as to the extent and character of the hearings before the Congressional Committees—the Amendment has to all intents and purposes been so interpreted as if after the words "beverage purposes" "medicinal purposes" were added, or as if the words "beverage purposes" were deleted.

Thereby there is a disregard of the explicit finding and promise of the Senate Judiciary Committee in promulgating the Amendment, that the use of liquor in medicine should not be interfered with. This promise and finding was so solemn that Judge KNOX went so far as to hold that, in his opinion, without the inducement of that promise, and finding, the Amendment would not have been adopted by the States.

Nor is this all as to the judicial construction of the Amendment in its application to this case.

For Dr. Lambert and other worthy physicians under the prohibition Acts of Congress as now interpreted are forbidden to alleviate pain or even to prolong and save life by the administration of more than one pint of intoxicating liquor in any ten days—**even though it be by the restorative enema.** For that intoxicating liquors are thus not infrequently administered by *enema,* appears from the writings of the great clinicians of America, England, Germany, France and Italy, whose text books are referred to in the Appendix to the main brief for appellant in this case.

Yet Dr. Lambert becomes a criminal if he follows his own judgment fortified by the judgment of these accepted medical authorities, and thus prescribes more than one pint of liquor in any ten days to be administered by *enema.* It is, we respectfully submit, inconceivable that Congress in proposing the Amendment or that the States in adopting it had the remotest intention of conferring upon Congress a roving commission, by any implicit finding, to perpetrate such a wrong.

And we are of the view that the conclusions to which this Court has arrived will not be adhered to if the record of the hearings before the Congressional Committees in 1919 and even in 1921 be brought before it, rather than the inadvertently incorrect but unsupported statements of counsel for the Government as to what happened at those hearings.

Accordingly, we urge that the complainant, Dr. Lambert, is entitled to the relief prayed for in this petition.

Respectfully submitted,

JOSEPH S. AUERBACH,
Attorney for Petitioner.

JOSEPH S. AUERBACH,
MARTIN A. SCHENCK,
Of Counsel.

I certify that, in my opinion, the foregoing Petition is well founded, and that it is submitted in good faith and not for purposes of delay.

JOSEPH S. AUERBACH,
For the Petitioner.